JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 78/80

BEFORE: THE HON. MR. JUSTICE ZACCA - PRESIDENT
THE HON. MR. JUSTICE ROWE, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)

BETWEEN: CHASE MERCHANT BANKERS JAMAICA LIMITED) - DEFENDANTS/ APPELLANTS

A N D : ROSE HALL (W.I.) LIMITED)

A N D : ROSE HALL LIMITED) - PLAINTIFFS/ RESPONDENTS

A N D : ROSE HALL (DEVELOPMENT) LTD.)

Mr. D.M. Muirhead, Q.C., and Mr. J. Leo Rhynie, Q.C., instructed by Mr. Nunes of Judah, Desnoes, Lake, Nunes, Scholefield and Co. for appellants.

Mr. Richard Mahfood, Q.C., and Dr. L. Barnett instructed by Mr. P. Millingen of Clinton Hart and Co. for the respondents.

November 30; December 1, 2, 3, 4, 1981; February 8, 9, 10, 11; June 23, 1982.

ZACCA, P.:

I have had an opportunity of reading the judgments of Rowe, J.A. and Campbell J.A. (ag.)

The real issue in this appeal was whether there was an inherent jurisdiction in the Court to stay the proceedings in the instant case. There is no doubt that the Court has an inherent jurisdiction to stay proceedings but it is being contended by the appellant that the Court can only stay proceedings where the application is made by a defendant.

In the exercise of its discretion to order a stay of proceedings, the Court cannot and should not be restricted, in view of its inherent jurisdiction to order a stay.

If the justice of the case demands a stay of proceedings, then it should not matter whether it is the plaintiff or defendant who is making the application.

Campbell, J.A. (ag.) has effectively dealt with the facts of the instant case and the legal principles involved in this appeal, and I agree with the conclusions which he has arrived at.

I too would dismiss this appeal with costs to the respondents to be taxed or agreed.

ROWE J.A.

The plaintiffs in suit E 211/76 who are the respondents in this appeal by their summons applied to Parnell J. for an Order:-

> "1. That the date fixed for the trial of the action herein be vacated,
>
> 2. that the case be removed from the trial and/or term lists and be only restored thereto by leave of a Judge; and/or
>
> 3. that all further proceedings in this action be stayed,

on the grounds that:

> (a) there is pending in the United States District Court for the District of Delaware against Chase Manhattan Overseas Banking Corporation and Holiday Inns Inc. an action claiming damage inter alia for the wrongful conduct of the Defendants in or about the sale or the exercise of a power of sale under a mortgage of property which is the subject matter of the action herein;
>
> (b) the Delaware action deals more comprehensively with the issues between the parties;
>
> (c) Delaware is the forum conveniens and has been so adjudged in litigation between the parties or on behalf of the parties;
>
> (d) the continuance of the action herein would be an abuse of the process of the Court and/or oppresive and vexatious to the Plaintiffs and be an injustice to them, the adjournment and/or stay of the action would cause no injustice to the Defendants, and relevant parties are amenable to the jurisdiction of the said Delaware Court in which justice can be done between the parties at substantially less inconvenience."

This application was strongly resisted by the defendants who are the present appellants but on December 19, 1980 Parnell J. made an Order in the following terms:

> "That all further proceedings in this action be and are hereby stayed while there is pending for hearing and determination Civil Action No. 79-182 in the United States District Court of Delaware and brought by the first plaintiff and the second plaintiff (as an involuntary party) against Chase Manhattan Overseas Banking Corporation and Holiday Inns Inc. as defendants. The question as to the incidence of costs occasioned by the hearing is reserved."

Parnell J. delivered a written judgment on February 12, 1981 on which occasion he ordered that the defendants (appellants) should have their costs incident to the application up to and including November 13, 1980 and that the defendants (appellants) should pay to the plaintiffs the costs incurred by the plaintiffs after November 13, 1980 including the costs of the five day hearing. There was a subsequent variation of this order for costs. However, as the present appellants had put in their notice and grounds of appeal well before the order for costs was made as set out in the written judgment and as they did not file a further appeal against the order for costs after February 12, 1981, their attempt to demonstrate that the learned trial judge had erred in law in penalising the defendants in costs, was still-born.

I will essay a short history of the litigation preceding the summons before Parnell J. and for this purpose I will treat the respondents as if they were for all purposes a single entity with the same rights, entitled to the same remedies, and called by the composite name "Rose Hall", except where that would lead to confusion. Rose Hall owned all the shares in Rose Hall (H.I.) Ltd and in addition in excess of three thousand acres of land all situate in Jamaica. Rose Hall (H.I.) Ltd owned a hotel called the Rose Hall Holiday Inn which in 1976 and previously was operated by Holiday Inns of the Bahamas Limited whose parent company was Holiday Inns Incorporated, a corporation of Tennesee, U.S.A. Rose Hall (H.I) Ltd had an indebtedness to the Bank of Nova Scotia, Toronto, Canada of U.S. $6.5 million dollars and as security for the loan the Bank held a first mortgage over the hotel and its eleven acres of land. Rose Hall (H.I.) Ltd secured a second loan of U.S. 3 million dollars in 1974 from Chase Merchant Bankers Jamaica Limited, the security for which was all the shares in Rose Hall (H.I.) Ltd and 3,000 acres of land the property of Rose Hall. Rose Hall (H.I.) Ltd made default under the loan agreement with the appellant, hereinafter called Chase, and when pressed for payment Rose Hall having exhausted all its endeavours to sell portions of the

3,000 acres of land for development purposes entered into negotiations with the Government of Jamaica through the Urban Development Corporation for the sale to Government of the Hotel. Lengthy negotiations ensued which culminated in the negotiator for the Urban Development Corporation agreeing to recommend to the Government a purchase price of U.S. 14.25 million dollars which was later scaled down to U.S. 13 million dollars. One of the bases for arriving at the hotel's market value was the continued participation of the lessees as operators of the hotel on the then existing contractual terms. By early 1976, however, Holiday Inns presented to the Urban Development Corporation a posture of being an unwilling tenant which had been sustaining substantial losses in the operation of the hotel and so would be prepared to devote itself to every effort to re-negotiate the terms of the operating lease. From the point of view of the Government the sine qua non for the negotiated price was the on-going lease and when this bedrock came loose the negotiations collapsed. Faced with a depressed real estate market, a depressed tourist industry and no alternative proposal by Rose Hall to pay either accrued arrears or to service current interest and principal repayments, Chase offered to sell to the Government the shares in the Rose Hall (H.I.) Ltd for U.S. 2.225 million dollars and the 3,000 acres of land for U.S. 1 million dollars. In purchasing the shares Government would become liable for the debt to the Bank of Nova Scotia, Toronto and to sundry creditors to a further amount of $750,000.00. Government accepted Chase's offer and completion date was set for December 31, 1976. A feature of the negotiations between Government and Chase was that Chase Merchant Bank N.A., the parent company of the Jamaican corporation, would lend to the Government of Jamaica the amount of U.S. 5 million dollars to finance the purchase.

In October 1976, Rose Hall brought an action in which they sought declarations that Rose Hall (H.I.) Ltd was the beneficial owner of the lands sought to be transferred to the Government by Chase subject only to the legal mortgage in favour of Chase and an injunction to restrain Chase

from selling and transferring the 3,000 acres of land and also the shares in Rose Hall (H.I.) Ltd and in the alternative Rose Hall claimed damages. Chase put in a defence and counter-claim. The counter-claim sought a declaration that Chase was legally entitled to sell the lands and Shares held by it as security under the loan agreement. An interim injunction having been granted, the application for an interlocutory injunction came before me in my capacity as a Judge of the Supreme Court. I gave an oral decision on November 22, 1976 and put my reasons in writing on January 27, 1977. I refused to grant the interlocutory injunction on the principle that as the matters at issue between the parties stood at that time, damages would be an adequate remedy, and Chase which was said to have assets in Jamaica in excess of 10 million dollars and whose stated intention was to continue in business in Jamaica could meet whatever damages it was then estimated could be awarded to Rose Hall. The respondents appealed against that decision but abandoned their appeal after Chase transferred the lands and shares to the Government in December 1977 and the Government thereby became the indefeasible registered holders of both classes of property.

There is an action pending in the United States District Court for the District of Delaware intituled Civil Action No. 79-182 in which the parties are:

Rose Hall Ltd - Plaintiff
Rose Hall (H.I. Ltd - Plaintiff
(Involuntary) under second Count

v.

Chase Manhattan Overseas Banking
Corporation and Holiday Inns. Inc. - Defendants.

In their statement of complaint the first defendant is said to be a corporation organized under a Federal Reserve Act and authorised thereunder to engage in foreign or international banking or financial operations either directly or through the agency, ownership, or control of branches or local institutions and that in pursuit of its foreign banking activities the first defendant owns all the stock in Chase Merchant Bankers Jamaica Limited. It is alleged in that complaint that upon one theory, Chase Manhattan Overseas Banking Corporation, is liable under the provisions of the Edge Act 12 U.S.C. para. 601 et. seq. for the acts of its subsidiary, Chase Merchant Bankers Jamaica Limited.

The statement of complaint consisted of some 49 paragraphs in which the plaintiffs in that complaint charged the defendants inter alia with a conspiracy to mutually benefit themselves at the expense of the plaintiffs. At paragraph 20 it is stated:-

> "The defendants whose selfish interest came to co-incide, proceeded, maliciously and wrongfully, to conspire and agree to frustrate consummation of Rose Hall Ltd's arrangement with the Jamaican Government and to do whatever they could to promote and effect a sale of the Hotel Asset on any terms at all provided only that Chase recouped its loan and Holiday Inns Inc. obtained or was assisted by events in obtaining concessions as to the lease, all to the great loss and damage of Rose Hall Ltd. Pursuant to such conspiracy, and maliciously, wrongfully and in bad faith, Chase engaged in a course of conduct which included the acts hereinafter alleged."

Then at paragraph 33 and 34 it is pleaded:

> "33. In agreeing to sell the Hotel Asset and the 3,000 acres for a grossly insufficient price and to arrange the financing with a U.S. $5,000,000 loan, Chase was wrongfully, and at the expense of the plaintiff, seeking to substitute a government guaranteed loan, the proceeds of which, on information and belief, it is believed Chase thought would be more susceptible to repatriation to the United States.

"34. As a result of the conspiracy with Chase and as a result of its own unlawful improper and tortious actions, all as described above, defendant Holiday Inns Inc. succeeded ultimately in obtaining major modifications of its rights and obligations with respect to the Hotel Asset."

In its final paragraphs the claim was quantified and the Court was asked, firstly, to order the defendants to account to Rose Hall Ltd under paragraphs 33 and 34 and secondly to enter judgment in favour of Rose Hall Ltd for damages in the amount of $72,000,000 together with punitive damages of an unstated amount, plus interest and costs.

By motion, Chase Manhattan applied to Senior Judge Steel in the U.S. District Court for the District of Delaware for Summary judgment on the grounds that Delaware is not a proper forum, that Chase Jamaica was not joined as a party defendant although it is a necessary or indispensable party under a relevant Federal Rule, that the complaint should be dismissed because it failed to state a claim against Chase Overseas when viewed most favourably to Rose Hall, that insufficient evidence existed to require a trial on the issue of control, and finally that the complaint was statute barred. Judge Steel decided all these questions against Chase and denied its motion. Senior Judge Steel gave as two reasons why Delaware was the proper jurisdiction to try the Delaware action rather than Jamaica, that Chase Manhattan is not a party to the Jamaican suit and so is not amenable to its process and that the Delaware action involved the intrepretation of the Edge Act on which Rose Hall so importantly relies.

Consequent upon the dismissal of Chase Manhattan's motion for summary judgment, a number of pre-trial steps have been taken in the Delaware action with a view to full discovery, including the deposition testimony of witnesses. In the meantime, however, the Jamaican action was, on the Return Day of July 24, 1980 set down for trial to commence on January 7, 1981 and to continue for three weeks. Rose Hall did not wish to have the trial in Jamaica commence on January 7, 1981 and so it filed the summons earlier referred to, (which was heard and determined by Parnell J.) and supported this summons by an

affidavit from Mr. Tunnel, its attorney-at-law. Mr. Tunnel swore in part that:-

> "8. Unlike the Jamaican action, which was primarily concerned with an application for an injunction to stop the sale by the first plaintiff herein, which application was unsuccessful, the Delaware action is concerned with damages for the wrongful conduct of the first defendant as well as of Holiday Inns, Inc. in connection with the sale.
>
> "15. In these proceedings the contents of the action in the District Court of the United States for trial would result in adjudication of the live issues by the parties.
>
> "16. It is respectfully submitted, therefore, that the hearing of this action in January would merely tend to obscure rather than resolve the real issues between the parties and would lead to unnecessary expense."

At the hearing of the summons the submissions made on behalf of Rose Hall found great favour with Parnell J. He made a passing reference to the inherent jurisdiction of the Court to stay proceedings for good and sufficeint cause and went on to base his reasoning and judgment on an interpretation of the statutory provisions of section 48 (e) of the Judicature (Supreme Court) Act which is in these terms:

> "No proceeding at any time when pending in the Supreme Court shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of such proceeding might have been obtained if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto; but nothing in this Act contained shall disable the Court from directing a stay of proceedings in any cause or matter pending before it if it think fit, and any person, whether a party or not to any such cause or matter, who would have been entitled if this Act had not been passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Court, by motion in a

> "summary way, for a stay of proceedings, either generally or so far as may be necessary for the purposes of justice, and the Court shall thereupon make such order as is just."

The learned trial Judge held that under section 48 (e) above the following persons are entitled to be an applicant for a stay:-

> "(1) Any person whether a plaintiff or a third party to the suit or any other person who can show a sufficient interest;
>
> (2) any person who is entitled to enforce any judgment decree rule or order given or made in the case or which could have been given or made."

Rose Hall does not, however, seek to place itself within the second category of persons as set out in the judgment quoted above for the purposes of this appeal.

Three principles were set out by the learned judge as the guidelines which would assist him in coming to a proper determination of the case. These are:

> "(1) where there is a possibility that a plaintiff may reap an advantage by prosecuting a suit in two countries, the Court should not disturb him. And if a stay should be granted by the Court in order to avoid a duplicity of proceedings, or to save expenses or trouble, the order will be made to assist the party applying who shows that it would be more beneficial to him and that no detriment will be suffered by the other party.
>
> "(2) In general, the plaintiff ought to pursue the defendant in the Court to which he is normally subject .....
>
> "(3) Where it is shown that the plaintiff has bona fide brought an action in a foreign country against a defendant and that there is pending in Jamaica an action based on the same facts in which he is the plaintiff - but that an injustice will be suffered by him if he prosecutes the action here and that the defendant will not be prejudiced by defending the action abroad, a case is made out for a grant of a stay at the instance of the plaintiff."

After outlining these guidelines, Parnell J. went on immediately thereafter to say:-

> "On the facts before me, the plaintiffs have shown that it would be idle to litigate here."

When the judge came to summarize his reasons he repeated the above opinion that the Jamaican action is now but a "paper -case" when he said:-

> "If the veil of incorporation is lifted it will be shown that the real complainant is Mr. John Rollins, an American and a resident of Delaware. He has satisfied me that the continuance of his action in Jamaica would bring him no benefit whatever if he is successful and that the defendants will suffer no harm or injustice if the trial of his Delaware action proceeds."

Before us Chase has argued that Rose Hall in its capacity as a plaintiff is not entitled to a stay of its own action either under the inherent jurisdiction of the Court or under the statutory provisions contained in Section 48 (e) of the Judicature (Supreme Court) Act. Chase further argued that if the application was based on the applicability of the principles of lis alibi pendens, it was bound to fail as the parties to the actions in Delaware and Jamaica were not the same, the issues were not the same, and the application for a stay was not made by the party against whom proceedings had been brought. In other words the quarry is prepared for a stand-up fight whereas the hunter wishes only to thrust and wound today reserving his skill for another day.

That the Supreme Court of Jamaica has inherent jurisdiction to stay proceedings which are an abuse of its process whether they be frivolous, vexatious, harrassing, or groundless is beyond question. This inherent jurisdiction was fully conceded before us and it seems also before [illegible]ll J.

Three possible classes of persons could have been in the contemplation of the lawmakers as falling within the category,

> "any person whether a party or not to any such cause or matter who would have been entitled if this Act had not been passed to apply to any Court to restrain the prosecution thereof."

as legislated in section 48 (e) of the Judicature Supreme Court Act, viz:

(a) Third parties

(b) Defendants

(c) Plaintiffs

And all these persons in order to come to the Court today to ask for a stay of a pending action must have been able to have so done before 1883. Lord Denning in his judgment in R. v. Greater London Council ex parte Blackburn (1976) 3 All E.R. 184 at 191 held that Mr. Blackburn had standing to apply to the Court for an order of prohibition to prevent the Greater London Council from acting ultra vires its statutory powers and by so doing enabling the exhibition of indecent films. He said there that:

> "I regard it a matter of high constitutional principle that, if there is a good ground for supposing that a Government department or a public authority is transgressing the law, or is about to trangress it, in a way which offends or injures thousands of Her Majesty's subjects, then one of those offended or injured can draw it to the attention of the Courts of law and seek to have the law enforced."

A person may have standing to seek an order of prohibition in the criminal law on the basis formulated by Lord Denning but such a basis would not be authority for any third person to seek to interfere with a party and party action in the civil law. Indeed the judgment of Salmon L.J. in Gore v. Van Der Lan at (1967) 2 W.L.R. at 3666 sets the limits within which a third party could intervene to prevent the continued prosecution of an action. An old lady had obtained a "free pass" to ride on Liverpool Corporation's buses. The document which she signed was construed by the Court of Appeal to contain a condition which was void as against her. The old lady was injured on one of the Corporation's buses and she brought an action in negligence against the conductor. The Liverpool Corporation moved to stay the proceedings and the Court had to consider an English statutory provision similar to section 48 (e) above. Salmon L.J. said:

> "For the corporation to obtain the relief which it claims it would be necessary for it to show that before the Supreme Court of Judicature Act of 1873, it would have been entitled to apply to the Court in Chancery to restrain the plaintiff from bringing her action against the defendant. In order to succeed the Corporation would have to establish that the action was a fraud on the Corporation either (i) because the Plaintiff had agreed with the Corporation for good consideration not to bring such an action or (ii) because of some other good reason."

Where as in that case the Corporation was maintaining that if damages were awarded against its servant, the Corporation would be called upon to pay any damages on behalf of the servant, the Court held that this could not be a sufficient reason for its intervention as there was no rule of law that a master was legally bound to indemnify its servant for the tort of the servant.

By applying the reasoning of the Court of Appeal in Gore v. Van Der Lan supra, if a plaintiff could not bring forward a motion to stay its own proceedings in its capacity as plaintiff, if it sought to rely upon the wider meaning of "any person" in the section, it would be faced with the difficulty of proving that the continuation of the action was a fraud against itself.

By the very nature of the proceedings, it is natural and normal that the applicant for a stay should be a defendant. He, in the course of things, would be the one taken to Court against his will and it is not surprising therefore that the learned authors of Halsbury's Laws, Dicey & Morris' Conflict of Laws and Cheshire's Private International Law, speak only of applications by defendants when treating with applications for stay of proceedings. It is the defendant who is doubly vexed by being called upon to litigate twice over in relation to the same subject matter at the instance of the same plaintiff. But Mr. Muirhead says that the defendant is not only the natural applicant, but that in proceedings such as this he is and can be the only applicant for a stay of proceedings.

What then we have to decide is whether and in what circumstances a plaintiff could before 1873 have applied by injunction to restrain its own action.

Up to the time when a defence is filed, a plaintiff may by notice in writing wholly discontinue his action. He will be liable to the defendant for his costs thrown away through that abortive action but such a plaintiff is not solely thereby disentitled from bringing a fresh action arising out of the same cause of action, see Sections 240-243 of the Judicature Civil Procedure Code. Where a suit has progressed to the stage of Summons for Directions and actual setting down for trial, a plaintiff can only discontinue the action with the leave of the Court. The leave granted may be on terms that the plaintiff be not at liberty to bring a fresh action in the same matter.

It was put forward on behalf of Rose Hall that on the question of who was, prior to the Judicature Act, entitled to apply, the principles relating to an application for an injunction or prohibition are applicable. Those principles they say never limited the persons with locus standi to whether they were named as plaintiff or defendant in any relevant proceedings, as the basic principle was sufficiency of interest by reason of the fact that what was sought to be restrained would adversely affect their genuine interest and they were not merely busybodies. It is necessary to refer to three of the cases cited in support of these propositions.

The first in time Beckford v. Kemble (1882) 1 Sm & St 7, 57 English Reports Book 2, p. 3 had a Jamaican connection. The English Court was moved on behalf of the plaintiff, for an injunction to restrain the defendants from all proceedings in a suit instituted by the defendants in the Court of Chancery in Jamaica against the plaintiff and from all other proceedings in the said Court against the plaintiff, for foreclosure and sale of the plantations and premises in question in the cause. The ground of this application was, that these defendants had instituted the suit for foreclosure in the Jamaican Court, after the decree in the English Court

which directed certain accounts to be taken for the purpose of ascertaining the amount of the mortgage debts, with a view to redemption. The injunction was granted.

This case is no authority for the proposition that a plaintiff could before 1873 apply to the Court for an injunction to stay his own action. The English plaintiff was the defendant in Jamaica and although the application for the injunction was made in England it was directed to the Jamaican suit.

Smith v. Chadwick (1876 - 77) 4 Ch. 869 is more in point. 78 plaintiffs had brought 78 separate actions against the same defendant arising out of certain company transactions. To ensure an orderly presentation of the cases the solicitor who acted for all the plaintiffs suggested to the solicitor for the defendant that one of the actions should be tried as a representative action and the others would abide the result. This suggestion was rejected by the defendant who took out a Summons to dismiss 77 of the actions for want of prosecution. The plaintiff's countered by a motion asking for consolidation of the 78 actions or that one of the actions should proceed as a representative action while the others be stayed.

Malins V.C. found a way to do justice between the parties. He had no power under the law as it then stood to order consolidation nor was there any statutory power to grant a stay. He said:

> "But there are now pending 77 applications to dismiss these actions for want of prosecution and that would be a preposterous thing to do. But, on the other hand, the plaintiffs cannot be allowed to bring forward one plaintiff after another and so overwhelming the defendant with a succession of actions."

Later he said:

> "No harm can be done by staying the next step in the other actions, and if I have no power to make this order, I think I ought to have it. But I think I have sufficient power arising out of the general control which the Court always exercises over proceedings commenced here."

What really happened in Smith v. Chadwick is that the defendants motion to strike out the 77 actions was denied because the plaintiffs were given extended time within which to take the next step in the actions. However, Rose Hall argues that if a plaintiff could not in any circumstance seek an injunction in his own action, the motion in Smith v. Chadwick would have been dismissed out of hand for want of jurisdiction.

In Hyman v. Helm (1883) 24 Ch, D. 531, B, resident in San Francisco, brought an action against C in England alleging that C had been B's agent to purchase from him goods in England, that B had recently discovered that C had in the accounts rendered charged more for the goods than he had paid for them and asking for an account against C as agent. C denied agency and claimed a large balance from B. C then commenced an action in San Francisco against B for a sum of money which he alleged to be due. B moved in England to restrain the San Francisco action.

In giving judgment Brett M.R., said at page 537:

> "It seems to me that where a party claims this interference of the Court to stop another action between the same parties, it lies upon him to show to the Court that the multiplicity of actions is vexatious, and that the whole burden of proof lies upon him. He does not satisfy this burden by merely showing that there is a multiplicity of actions, he must go further. If two actions are brought by the same plaintiff against the same defendant in England for the same cause of action, then, as was said in McHenry v. Lewis and the case of Peruvian Guano Company v. Buckwoldt prima facie that is vexatious, and therefore the party who complains of such a multiplicity of actions has made out a prima facie case for the interference of the Court."

As it was in Beckford v. Kemble, so it was in Hyman v. Helm that the plaintiff in the English suit was the defendant in the foreign action and what he sought here to obtain was not a stay of his own action but that of the defendant in the English suit in his capacity as

plaintiff in the foreign suit. The applicant lost on the merits and it is not surprising on the facts that no point was taken in limine that he had no standing. But quite shortly such a point would be wholly inapposite, as the plaintiff was not in his capacity of plaintiff seeking to have a stay of his own action.

Ladywell Mining Co. v. Huggons (1885) W.N. 55 was a case in which the plaintiff attempted to rely upon the reasoning of the Court in the Chadwick series of litigation where the 78 plaintiffs had wished to have one action tried as a representative action. They failed. There were but two defendants in the Ladywell case and Pearson J. held that as it was unnecessary for them to bring two actions, their summons to have one action stayed until the determination of the other, was not well founded. Rose Hall argues that it is not interested in the outcome of the application in the Ladywell case but what is material is the fact that the summons was not dismissed for want of jurisdiction, and forms another example of a plaintiff being permitted access to the Court to apply for a Stay of its own proceedings.

I do not accept that the cases of Smith v. Chadwick supra and Ladywell Mining Co. v. Huggons are illustrative of a general principle that prior to 1873 a plaintiff was always at liberty to move the Court to grant an injunction to restrain the prosecution of an action brought by a plaintiff. They at best form an exception to the general rule that a plaintiff could not apply. That exception could be framed this way. Where there are several plaintiffs who have brought actions against single defendant arising out of the same subject matter and the trial of one of those actions would for all purposes determine all the factual and legal issues between the parties, then the Court would exercise its inherent jurisdiction to prevent the plaintiffs from bringing one action after another which would effectively clutter up the work of Court and overwhelm the defendant, and the Court would then order the plaintiffs to abide by the result of the representative action. Apart from this

limited exception which I put forward, I am not persuaded that a plaintiff prior to 1873 had a standing to apply to the Court for an injunction to restrain it from proceeding with an action instituted by itself as plaintiff.

On this pivotal question of whether the plaintiff has standing to apply to the Court to restrain his own action, Chase relied on three cases to show how apart from a lis pendens situation, the Court proceeded prior to 1873 to grant injunctions. It is well to state at the outset othat in none of the cases which I will mention herein was the plaintiff the applicant for the stay of its own action. Eden v. Ne[illegible] (1878) 7 Ch. D. 781 is authority for the proposition that if the plaintiff and defendant sign a compromise, whereby it was agreed that the plaintiff accept a sum of money (for his share in the partnership business) if the plaintiff subsequently repudiated that agreement and proposed to proceed with his action, the Court would prior to 1877 [illegible] jurisdiction at the instance of the defendant to order a stay of all further proceedings in that action. In Marshall v. Marshall (1879-80) 5 P.D. 19, Sir J. Hannen refused to grant a stay of execution on the application of a defendant in an action brought by his wife for restitution of conjugal rights on the defendant's contention that the petitioner was bound by deed not to institute [illegible] such a suit. And in White v. Harrow; Harrow v. Marylebone District Property Co. Ltd (1901) 85 L.T. 677, where the assignee of a lease contrary to [illegible] covenant in a deed instituted proceedings to restrain the defendant company from building so as to obstruct light to his premises, Joyce J. held:

> "It is my opinion that in order to make any sense of this covenant it must extend at all events to the raising of any objection to building works on the adjoining premises sanctioned by the lessor or superior landlord. Then, if I am right in that, how would this case have stood before the Judicature Act? It seems to me that, before the Judicature Act, instituting an action against the persons interested in the adjoining premises to restrain them from proceeding with the construction of works which have been sanctioned by the lessor or superior landlord would at all events be very forcibly raising an

> "objection. Therefore I think that before the Judicature Act, Mr. White would be entitled to an injunction to restrain the further prosecution of that action so far as it related to obtaining an injunction to stay works which had been sanctioned by the lessor or superior landlord. Then, if that be so, since the Judicature Act, having regard to the 24th section, Mr. White was entitled to apply in the action of White v. Marylebone District Property Company Limited to stay proceedings."

The principle upon which these cases proceeded seems tolerably clear. If a man by agreement for valuable consideration or by deed bound himself not to bring an action against another, then if in breach of that agreement or covenant he should institute the very proceedings he has bound himself not to institute, the Court would restrain him by injunction before 1873 and by a stay of proceedings after the Judicature Act. With what countenance would equity look upon a plaintiff who, having instituted his action in the teeth of his own agreement, have recourse to equity to place upon himself a restraining hand. I would think with a deep, deep frown.

Can a plaintiff who is a defendant to a counter-claim in the same action in his capacity as qua defendant have the locus standi to ask for a stay of the action. Parnell J. found that he could and it has been argued before us on behalf of Rose Hall that that is a correct decision in law. In Hyman v. Helm supra. Bowen L.J. did not give a firm opinion on this question: He said at page 543:-

> "Then is it vexatious that the defendants here should seek to become plaintiffs in San Francisco? Before the Judicature Act I presume it certainly was an unheard of thing for a plaintiff to complain that a defendant was taking independent proceedings. Of course there was before the Judicature Act an obvious advantage to a man in becoming an actor instead of being a passive defendant. I am not prepared to say that matters are on quite the same footing since the Judicature Act. It is not necessary to decide it. I am not quite sure whether a counter-claimant before decree since the Judicature Act is not an actor to some extent, and in such a sense it might be vexatious in him both to prosecute his counter-claim here, and to prosecute the same case by independent action elsewhere."

Before I leave this case, it may be opportune to recall what Cotton L.J. had to say about the respective control which a plaintiff and a defendant could exercise over the conduct of a suit. At page 540 of the Report, in Hyman v. Helm supra he said:

> "Before decree the cases of the defendant and of the plaintiff are obviously very different. A defendant up to decree has no control in the action except that he can move to discuss it if the plaintiff does not go on ....."

Assuming that Parnell J. was correct that Rose Hall could qua defendant move the Court to stay proceedings on the counter-claim put in by Chase, would this standing spread to the whole action and so enable Rose Hall to ask for a stay of its own claim? A counter-claim is substantially a cross-action; not merely a defence to a plaintiff's claim. A counter-claim is to be treated, for all purposes for which justice requires it to be so treated as an independent action, Amon v. Bobbett 22 QBD 548. If after the defendant has pleaded a counter-claim, the action of the plaintiff is for any reason stayed, discontinued, or dismissed, the counter-claim may nevertheless be proceeded with. See section 213 of the Judicature (Civil Procedure) Code.

In the absence of authority to the contrary, it would be illogical, in my opinion, for a plaintiff to seek to extend a power which it has qua defendant to a situation where it is a plaintiff with remedies and procedures apposite to its position as plaintiff. Consequently, in so far as Parnell J.'s decision as to the standing of the plaintiff to apply for a stay was based upon his being a defendant to the counter-claim, it cannot in my view be supported.

Chase mounted a long, detailed and sustained argument before the Court to indicate that Rose Hall's application for a stay was based upon the lis alibi pendens principle. This plea is sufficiently stated at page 119 of the Ninth Edition of Cheshire's Private International Law as follows:

> "The question that this plea raises is whether the English Court will stay an action, either domestic or foreign, on the ground that the applicant is doubly and unnecessarily vexed, since the same cause of action between the same parties is being litigated in a foreign country. If a litigant brings two actions about the same matter in two different courts in England, his conduct is in all cases deemed to be vexatious, and the defendant may demand that he shall elect between the two proceedings. Where, however, one of the actions has been instituted abroad, a party is not necessarily and invariably put to his election. The English Court undoubtedly possesses jurisdiction to stay one of the actions but it is a discretionary power that is not lightly exercised in favour of a stay."

Cheshire says that the question of lis alibi pendens may arise in two different cases, viz,

> (1) where the plaintiff in England is plaintiff also in a foreign country - and
>
> (2) where the plaintiff in England is defendant abroad or the defendant in England is plaintiff abroad.

In the first of these two cases the person against whom a stay is sought has himself initiated two actions whereas in the second a party who is plaintiff in one suit is the defendant in the other. Cheshire states further that a plea of lis alibi pendens will not succeeded and the Court will not order a stay of proceedings, unless the defendant proves vexation in point of fact and also prove that a stay will not cause an injustice to the plaintiff.

In support of its argument that Rose Hall's application for a stay is based on the lis alibi pendens rule, the attorney for Chase referred us to the form of the summons and its similarity with the precedent for such summons to be found in Atkins Court Forms. In particular paragraph 3 (a) of the Summons complained that:-

> "(a) the continuation of the action herein would be an abuse of the process of the Court and/or oppresive and vexatious to the Plaintiffs and be an injustice to them, the adjournment and/or stay of the action would cause no injustice to the Defendants, and relevant parties are amenable to the jurisdiction of the said Delaware Court in which justice can be done between the parties at substantially less in convenience."

Chase says that this is indeed the kind of pleading which one would expect to find where the plea is based on the lis alibi pendens principle. They say that the Jamaican action and the Delaware action are not the same in that the triable issues are manifestly different and there is no co-incidence of parties and that as a consequence the bases for the application of the lis alibi pendens rule are non-existent.

Even the most cursory reading of the pleadings in the Jamaican and Delaware actions reveals that indeed the parties to the two actions are not the same. The two defendants to the Delaware action are entirely different from those in the Jamaican action and Rose Hall (H.I.) Ltd, an involuntary plaintiff in the Delaware action is not a party to the Jamaican action. The substantial remedies sought by Rose Hall against Chase Manhattan Overseas Banking Corporation and Holiday Inns Inc. are for conspiracy and for an Account and the compensatory damages claimed are in the sum of 72 million dollars together with an additional unspecified sum as punitive damages. There are no similar causes of action or similar claims for damages in the Jamaican action. It is worthy of mention that the sole issue raised in the Counter-claim to the Jamaican action is not now being contested by Rose Hall as Rose Hall accepts that Chase had the power to sell, leaving aside whether those powers were exercised in a manner permitted by Jamaican law.

Many hours of argument could have been avoided if Chase knew that Rose Hall would not be maintaining that its application was based on the lis alibi pendens principle. Mr. Mahfood submitted that even a cursory reading of the summons made it clear that the application was not based on the lis alibi pendens doctrine. He said that a common but

not the only ground on which the court will order a stay of proceedings is lis alibi pendens. All the authorities, he said, treat the doctrine as just one head under which the Court may exercise its wide discretion in ordering a stay, so that identity of parties and issues is not essential to the Court's exercise of its jurisdiction. So on an issue upon which the appellant came into Court well prepared, victory was conceded to him by a walk over.

The decision of the House of Lords in Castanho v. Brown & Root (U.K.) Ltd and another (1981) A.C. 557 was cited to us by the attorneys for both the appellants and the respondents in support of various propositions. That case had a true international flavour. The plaintiff, a Portuguese subject, resident in Portugal, was severely injured by an accident in February 1977, while he was employed by the second defendants, a Panamanian Company, on an American ship lying in an English port. Both defendants were associates of a large Texea based group of companies. The plaintiff commenced proceedings in England and obtained an admission of liability for negligence from the defendants and equally tangible, an interim payment of €27,500. Through the intervention of certain American attorneys the plaintiff brought an action in the United States Federal Court in Texas where he hoped to obtain more than ten times the maximum damages which he could possibly obtain in England. So as to be able to proceed with his Texas action, the plaintiff filed a Notice of Discontinuance of his English suit. The House of Lords held that in the circumstances the plaintiff's Notice of Discontinuance was an abuse of the process of the Court as it was inconceivable that the Court would have allowed a plaintiff, who had secured interim payment and an admission of liability by proceeding in the English Court to discontinue his action in order to improve his chances in a foreign court without being put upon terms, which could well include not only the repayment of the moneys received but an undertaking not to issue a second writ in England.

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Lord Scarman equated the principles which are applicable for a stay of proceedings with those for the grant of an injunction and in relation to the latter which was the question before the House he said:

> "I turn to consider what criteria should govern the exercise of the Court's discretion to impose a stay or grant an injunction. It is unnecessary now to examine the earlier case law. The principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings. The modern statement of the law is to be found in the majority speeches in The Atlantic Star (1974) A.C. 436. It had been thought that the criteria for staying (or restraining) proceedings were two fold: (1) that to allow the proceedings to continue would be oppresive or vexatious, and (2) that to stay (or restrain) them would not cause injustice to the plaintiff: see Scott L.J. in St. Pierre v. South American Stores (Gath & Shaves Ltd (1936) 1 K.B. 382, 398. In the Atlantic Star this House, while refusing to go as far as the Scottish doctrine of forum non conveniens, extended and reformulated, the criteria, treating the epithets 'vexatious' and 'oppresive' as illustrative but not confining the jurisdiction. My noble and learned friend Lord Wilberforce put it in this way. The 'critical equation' he said at page 468, was between 'any advantage to the plaintiff' and 'any disadvantage to the defendant'."

Later Lord Scarman repeated with approval what Lord Diplock said in McShannon v. Rockware Glass Ltd (1978) A.C. at 812, viz.

> "In order to justify a stay two conditions must be satisfied, one positive and the other negative:
>
> (a) the defendant must satisfy the Court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay, must not deprive the plaintiff or a legitimate personal or judicial advantage which would be available to him if he invoked the the jurisdiction of the English Court."

As to this last quoted passage, Lord Scarman had this to say:-

> "The formula is not, however, to be construed as a statute. No time should be spent in speculating as to what is meant by 'Legitimate' It, like the whole of the context, is but a guide to solving in the particular circumstances of the case the 'critical equation' between advantage to the plaintiff and disadvantage to the defendants."

If on the facts the critical equation arose for determination, one would be bound to look for some present objection on the part of Chase to the continuation of Rose Hall's action in Delaware and one would look in vain because Chase is not now attempting to interfere with Rose Hall's prosecution of its case in Delaware. That case is well on the way. The voluminous affidavits filed by Rose Hall for the purposes of this appeal are all to be effect that the Delaware Court is the proper forum for the determination of all the extant issues between the parties to the Jamaican action. If that be the stand adopted by Rose Hall, then surely it must be asked the pertinent question, why are you keeping on the files in Jamaica an action as to which you have tendered evidence sufficient to satisfy Parnell J., that "the continuance of his action in Jamaica would bring him no benefit whatever if he is successful." Rose Hall must be saying, that its action in Jamaica has spent itself by a combination of circumstances and it is now void of content, an empty, moribund symbolic thing. It must be an abuse of the process of the Court for a plaintiff to seek the Court's assistance to preserve a cause of action in which it has no practical interest and from which it hopes to derive no advantage. In my opinion the facts in the instant case do not rise to the level where one can properly consider the "critical equation". Rose Hall has chosen a forum from which it hopes to reap tenfold all the advantages that could conceivably be obtained from the Jamaican action and consequently it has an interest in prosecuting that action. Chase is content to have the matters at issue between itself and Rose Hall heard and determined in Jamaica, according to Jamaican law and where important Jamaican witnesses and Jamaican records are readily available

and compellable. Chase has had to defend the Jamaican action over a number of years and in numerous interlocutory proceedings. An indefinite postponement of the Jamaican action which may have to await not only the trial process but the relevant appeal procedures in Delaware, may have the effect that all important witnesses may die or their memories may fade before the Jamaican action comes up for trial. In that regard as well as on the question of costs Chase would be severly prejudiced by a stay of the proceedings.

It is with the greatest of respect that I differ from the conclusions of Parnell J. I find that in the instant case Rose Hall is an incompetent applicant for a stay, that on the facts Rose Hall has nothing legitimate to gain from a stay, whereas an indefinite postponement of the action would be disadvantegeous to Chase.

This appeal should be allowed with costs to the appellant. Due to the manner in which Parnell J. delivered his judgment, the appellant put in his notice of appeal before the question of costs was settled and did not specifically file a notice of appeal against the judge's order for costs. It was contended by the respondents and in my view rightly so, that there was no subsisting appeal against the orders for costs in the Court below. Those orders must therefore stand.

CAMPBELL, J.A. (AG.):

By summons in Suit E. 211 of 1976 heard by Parnell, J. the respondents sought an order from the Supreme Court in exercise of its inherent jurisdiction and or under Section 344 and Section 686 of the Judicature (Civil Procedure Code) Law that:

> (a) the date fixed for the trial of the action be vacated;
>
> (b) the case be removed from the trial and/or term lists and be only restored thereto by leave of a judge; and/or
>
> (c) all further proceedings in the action be stayed.

The learned trial judge on the 19th day of December, 1980, ordered:

> "That all further proceedings in this action be and are hereby stayed while there is pending for hearing and determination, civil action No. 79-182 in the United States District Court for the District of Delaware and brought by the first plaintiff and the second plaintiff (as an involuntary party) against Chase Manhattan Overseas Banking Corporation and Holiday Inns Inc. as defendants."

The appeal before us is against this order.

The facts providing the background to the summons have been set out fully by the learned trial judge in his written judgment delivered on February 12, 1981. It is therefore only necessary for me to summarise in outline and as succinctly as possible the minimum facts relevant for the determination of this appeal.

Rose Hall Limited the first respondent (the principal plaintiff in the suit) is a company incorporated in the Cayman Islands having its principal office in Jamaica. Prior to its dispute with Chase Merchant Bankers Jamaica Limited the first appellant (the principal defendant in the suit) hereafter called Chase Jamaica, Rose Hall Limited owned real estates in Montego Bay, St. James, Jamaica. It owned some of these real estates in its own name. Others it owned derivatively through two wholly owned subsidiary companies both incorporated in Jamaica namely Rose Hall (H.I.) Limited and Rose Hall (Development) Limited, all of whose

issued shares it owned. To complete this picture of derivative ownership it should be mentioned that Rose Hall Limited is itself a wholly owned subsidiary of Rollins (Jamaica) Limited a company incorporated in Delaware, United States of America whose shares are all owned by Mr. John Rollins, Sr., a citizen of the United States of America, resident in Delaware.

Rose Hall (H.I.) Limited owned the Holiday Inn Hotel in Montego Bay. It leased the hotel in June, 1970 to a Bahamian company named Holiday Inns of the Bahamas Limited. The latter assigned the lease to Holiday Inns (Jamaica) Limited a wholly owned subsidiary of Holiday Inns Inc. both of which are incorporated in Tennessee, United States of America. At all material times Holiday Inns Inc. guaranteed the obligations under the lease of its subsidiary and thus had a vital interest in the future of the hotel.

Subsequent to the lease transaction, Rose Hall (H.I.) Limited executed in favour of the Bank of Nova Scotia a first mortgage on the hotel, and a pledge of the proceeds of the lease as security for consolidated loans obtained for the construction of the hotel totalling $U.S.6,250,000.00. The repayment of this loan was further secured by guarantee given by the Government of Jamaica.

In May, 1974 Rose Hall Limited borrowed from Chase Jamaica the sum of U.S.$3,000,000.00 and as security for the loan gave a second mortgage on the hotel, a first mortgage on 3,000 acres of its directly owned real estate, and a pledge of all its shares in Rose Hall (H.I.) Limited.

Rose Hall Limited was soon in difficulties in respect of the agreed instalment repayments of the loan and being in arrears, commenced negotiations with the Government of Jamaica about the middle of 1975 with a view to selling to her the hotel. Before the negotiations could crystallise into a sale, Chase Jamaica took over the said negotiations and offered for sale to the Government the 3,000 acres of land which it held as mortgagee in addition to the hotel. Chase Jamaica had earlier in the year, to safeguard its security in the hotel, secured a transfer to itself

of the shares in Rose Hall (H.I.) Limited which it had previously held in pledge. Chase Jamaica and no longer Rose Hall Limited was now able to direct the policy of Rose Hall (H.I.) Limited and the negotiations on its behalf with Government.

Rose Hall Limited and Rose Hall (Development) Limited were of the view that the offer of sale of the hotel and 3,000 acres of land made to the Government by Chase Jamaica was inordinately low and detrimental to their interests. They accordingly commenced suit against Chase Jamaica and Rose Hall (H.I.) Limited in Suit E. 211 of 1976 on 4th October, 1976. Immediately thereafter Rose Hall Limited and Rose Hall (Development) Limited sought an order of interlocutory injunction to restrain Chase Jamaica and Rose Hall (H.I.) Limited from proceeding with the contemplated sale pending the hearing and determination of the suit.

The order of interlocutory injunction was refused in a written judgment delivered on January 27, 1977, by Rowe, J. (as he then was). The learned judge though he found that there was a serious question to be tried between the parties namely whether the offer of sale to Government of the hotel and the 3,000 acres of land was at such a gross under value as to be evidence of fraud, nevertheless rightly refused to restrain the defendants. He refused the order because the plaintiffs had conceded that Chase Jamaica undoubtedly had the right to enforce its securities by sale. They had shown that their real ground of complaint was that Chase Jamaica ought not to consider itself entitled to sell upon the terms contemplated. Thus damages in the view of the learned judge and not a permanent injunction would be the appropriate relief granted at the trial if Rose Hall Limited was successful. Damages the learned judge concluded would be an adequate and recoverable relief because Chase Jamaica on the

evidence before him, which he accepted, had assets in Jamaica of approximately J.$10,000,000.00 and in addition it intended continuing business in Jamaica.

Chase Jamaica consummated the sale of the 3,000 acres of land and the hotel to the Government. The sale of the latter was effected through the technique of a sale by Chase Jamaica of the shares which it owned in Rose Hall (H.I.) Limited. The sale was consummated in December, 1977.

In or about April 11, 1979 Rose Hall Limited commenced Civil Action No. 79-182 against Chase Manhattan Overseas Banking Corporation (hereafter called Chase) and Holiday Inns Inc. in the United States District Court for the District of Delaware (hereafter called the Delaware action) claiming damages vicariously against Chase under a Federal Law of the U.S.A. known as the Edge Act for the wrongful sale by Chase Jamaica of the 3,000 acres of land of Rose Hall Limited and the shares in Rose Hall (H.I.) Limited.

Rose Hall Limited in that action also claimed damages personally against Chase and Holiday Inns Inc. for conspiracy and against Holiday Inns Inc. separately for alleged unlawful improper and tortious actions done by it. Rose Hall Limited contends that both the conspiracy, and the tortious actions of Holiday Inns Inc. arose in the course of Rose Hall Limited's negotiations with the Government for the sale of the hotel and these acts disabled it from successfully concluding the negotiations.

Rose Hall Limited having failed to restrain the sale of the hotel and land in Jamaica and for reasons stated in its affidavit was now desirous of mobilising its resources in prosecuting its claim against Chase in the Delaware action while leaving in abeyance its suit in Jamaica against Chase Jamaica. To achieve this end it brought the summons inter alia for vacation of the trial date of the suit in Jamaica. Its reasons gathered from its affidavits and from submissions before the learned judge were that:

(1) The Delaware action which is still pending deals more comprehensively with the issues arising out of the sale of the 3,000 acres of land and the shares in Rose Hall (H.I.) Limited not only as they relate to Chase Jamaica's conduct, but also as they relate to Chase itself and Holiday Inns Inc. both of whom are not amenable to the jurisdiction of the Court in Jamaica and so cannot be sued here.

(2) The sale of the shares in Rose Hall (H.I.) Limited and of the land having been concluded, the only relief remaining available in the Jamaican action is for damages which as a recoverable relief is, if not unavailable here, at best doubtful because Chase Jamaica now not only has no available assets in Jamaica but is not conducting business here.

(3) The prospect of damage as a recoverable relief in the Delaware action is more propitious because if Chase is adjudged liable under the Edge Act for the wrongs done by Chase Jamaica damages can be recovered from the vast assets of Chase.

(4) In the Delaware action the discovery of facts to establish the claim against Chase Jamaica as well as against Chase and Holiday Inns Inc. is greatly facilitated by the substantially more favourable pre-trial discovery and trial practices available in the Delaware action.

In summary the contention of Rose Hall Limited was that all advantages lay in the concentration by it of its energies and legal expenses in the Delaware action. It thus sought the assistance of the Court to enable it to avoid incurring further legal expenses in, and diversion of energies to the Jamaican action while prosecuting the Delaware action.

In my view the above reasons given by Rose Hall Limited which were not seriously disputed justify its desire not to pursue the suit in Jamaica for the time being, and unless there are strong and overriding reasons which would operate as an injustice to Chase Jamaica in having the action against it held in abeyance for a time a Court in its anxiety to dispense justice ought to accede to the application of Rose Hall Limited.

In this respect it is important to bear in mind that what Rose Hall Limited was asking for was a postponement of the trial of the Jamaican action to be effected through an order vacating the trial date and for the fixing of any new trial date to be subject to an order of the judge. The additional order sought namely "that all further proceedings in the action be stayed" in the context of what preceded, showed that the word "stay" was being used in its ordinary literal meaning as suspension of judicial proceedings which would necessarily follow as a consequence of the grant of the order vacating the trial date. The sections of the Judicature (Civil Procedure Code) Law mentioned by Rose Hall Limited showed clearly that it was asking for a suspension of the trial. Parnell, J. though he did not grant the order in the precise terms asked for, was fully aware of what was being sought and gave effect to it by ordering the suspension of proceedings pending the outcome of the Delaware action. Rose Hall Limited among the grounds on which it was seeking the order, actually used the word "adjournment" when it stated that "the adjournment and/or stay of the action would cause no injustice to the defendants."

Chase Jamaica did not in any affidavit sworn on its behalf, or in submission before Parnell, J. adduce any strong or overriding reasons based on hardship, prejudice or injustice to itself why the order should not be granted. It was rather Chase a third party, who put up a resolute and spirited resistance summarised thus:

1. Rose Hall Limited ought not to be permitted to force Chase Jamaica to the expense of the proceedings in the Delaware action because the underlying issue in the Delaware action being alleged wrongdoing of Chase Jamaica ought properly to be tried in Jamaica as it is controlled by Jamaican Law.

2. One of the claims of Rose Hall Limited against Chase being based on the alleged wrongdoing of Chase Jamaica, a judgment in the Jamaican action against Rose Hall Limited would render moot its claim against Chase in the Delaware action because in that action the judgment would operate as res judicata. Alternatively if judgment was given in the Jamaican action against Chase Jamaica it would for similar reason substantially reduce the scope of the proceedings in the Delaware action because

only the issue of liability of Chase under the Edge Act would remain for determination.

3. It would be distinctly advantageous for the action in Jamaica to proceed on schedule and with expedition as it will not be as protracted as the Delaware action because inter alia it is relatively free of the extensive pre-trial discovery and trial practices attendant on the Delaware action.

4. The parties and the issues in the Delaware action are different from those in the Jamaican action and therefore there is no factual basis on which a stay of proceedings can be ordered.

It is patently clear that neither Chase nor Chase Jamaica has effectively challenged on the merits the validity of the reasons given by Rose Hall Limited in seeking a suspension of the Jamaican action. Chase Jamaica did not raise a scintilla of evidence of hardship, prejudice or injustice requiring disproof by Rose Hall Limited as a condition of securing the discretionary order of the Court. Equally Chase in taking up the fight for Chase Jamaica succeeded only in establishing that it was Chase itself, a stranger to the proceedings, who would benefit immensely in reduced time and cost if the Jamaican action was determined in good time before the Delaware action proceeded to trial.

Before us Chase Jamaica through Chase has put forward substantially the same grounds as were canvassed before Parnell, J. These in summary are that:

1(a) the application having been brought by a plaintiff to stay its own action on the grounds stated in its application is misconceived;

(b) the application in so far as it was based on the principle of lis alibi pendens was misconceived as no lis alibi pendens situation existed because the parties were not the same, the issues were not the same, and even if they were, the application can only be made by the party against whom the concurrent proceedings have been brought that is to say a defendant and never a plaintiff;

(c) the grant of the application by the learned judge under Section 48(e) of the Judicature (Supreme Court) Act was erroneous because on a true interpretation of the section a plaintiff cannot apply to stay its own action on the grounds stated in the application.

(2) Alternatively the learned trial judge for the reasons more fully stated in this ground of appeal wrongfully exercised his discretion in making the order.

The main thrust of Mr. Muirhead's submissions before us may be succinctly summarised thus:

1. A plaintiff can never apply for a stay of proceedings where he has initiated actions in two jurisdictions simultaneously one local the other foreign, this is so because firstly unless the fact situation can be characterised as a lis alibi pendens situation there is no jurisdiction for the Court to interfere, and secondly even if the fact situation does characterise a lis alibi pendens situation the Court can be moved to interfere only at the instance of a defendant.

2. Section 48(e) of the Judicature (Supreme Court) Act which is in pari materia both with Section 41 of the Supreme Court of Judicature (Consolidation) Act 1925 (U.K.) and the former Section 24(5) of the Supreme Court of Judicature Act 1873 (U.K.) does not confer a jurisdiction on the Court to order a stay of proceedings on the application of a plaintiff.

As regards the first limb of the first submission, Mr. Muirhead has undoubtedly demonstrated through a careful and detailed analysis of the generally undisputed facts, that the fact situation cannot be characterised as a lis alibi pendens situation. Rose Hall Limited has however never contended otherwise. Indeed it has to the contrary, strenuously protested against its application being straight-jacketed by Chase as one in a lis alibi pendens situation.

I have benefited considerably from Mr. Muirhead's lucid and facile exposition of the lis alibi pendens principle posited in the numerous authorities referred to, and analysed in detail by him, as also from the treatises of learned authors whose persuasive authority he has invoked. However it is unnecessary for me to pronounce on this first limb of his submission because there is no specific ground of appeal that the learned trial judge had erroneously applied the lis alibi pendens principle to the application before him and of his having granted a stay on that basis. In so far as Ground 1(b) of the grounds of appeal suggests that the learned judge invoked the lis alibi pendens principle it is totally unfounded.

Excerpts from the trial judge's judgment throw light on his reasoning and the basis on which he granted the stay which is certainly not on the lis alibi pendens principle. Thus he says:

> "Page 216: - It is not in dispute that the court has inherent jurisdiction to stay proceedings where good and sufficient cause is shown." (Underlining mine).
>
> "Page 217: - Section 24(5) of the 1873 Act aforesaid, remove the power to restrain proceedings by injunction and recognised the inherent power of the court to order a stay."
>
> "Page 225: - Under section 48(e) of the Judicature (Supreme Court) Act, any person (whether plaintiff, defendant or otherwise) who is able to show a substantial interest in a suit may apply to the court for a stay of proceedings until a certain event is satisfied. Lis alibi pendens is only one of the grounds which may be urged in support of the motion." (Underlining mine).

I have already stated elsewhere that the learned trial judge was fully aware of the essence of the application.

This ground of appeal to the extent that it is based on the first limb of Mr. Muirhead's submission fails as not having been properly founded on the learned trial judge's judgment.

The second limb of the first submission of Mr. Muirhead covers Ground 1 (a) and (c) of the grounds of appeal which may conveniently be considered together. The complaint is that the learned judge was wrong in law in making the order because:

> (i) The application of the plaintiff on the grounds stated was misconceived in that a plaintiff was seeking to stay its own action which it can never do.
>
> (ii) Section 48(e) of the Judicature (Supreme Court) Act confers no right on the plaintiff to apply to stay its own action on the grounds stated in its application.

Mr. Muirhead in his submission before us said that in relation to a stay of proceedings, in all the known authorities, the application has been to stay the action of the other party. It is, he says, obviously a remedy available only to the party against whom action has been brought namely a defendant. It is he alone who can be put to a disadvantage because of the oppressive action on the part of the plaintiff.

Mr. Muirhead crystallised his submissions by stating that in all the cases on stay of proceedings in exercise by a Court of its inherent jurisdiction, such jurisdiction has only been invoked where the action that is brought constitutes an abuse of the legal machinery of the Court and is such that the Court of its own conscience will stay or dismiss the action. Only an applicant against whom an action is brought which is vexatious and oppressive and in addition constitutes an abuse of the process of the Court can invoke the inherent jurisdiction of the Court.

The questions for consideration here are firstly whether having regard to decided cases and or from a proper construction of Section 48(e) of the Judicature (Supreme Court) Act a plaintiff is precluded from making an application for a stay of its own proceedings, that is to say has a plaintiff locus standi independently of whether he ultimately succeeds on the merit of his application: secondly is the inherent jurisdiction of the Court which is preserved by Section 48(e) of the Act limited in its scope to cases of vexation and oppression which amount to an abuse of the process of the Court.

Mr. Muirhead's submission that in all the known cases, applications for stay have been brought by defendants is correct in so far as these cases involved the lis alibi pendens principle but it certainly is not correct to say that in situations other than those characterised as lis alibi pendens, a plaintiff has never been the applicant for a stay and that he has no locus standi qua plaintiff to apply for a stay of his own proceedings.

The undermentioned cases support the view that plaintiffs qua plaintiffs were not denied locus standi to apply for a stay of proceedings. Their applications were heard on the merit and appropriate orders made. These cases equally demonstrate the fact that "stay" does not only mean as Mr. Muirhead contends "to stay suit instituted against me." Application for a stay need not necessarily be a hostile act, it may be brought in a non-hostile situation seeking an indulgence from

the Court in the exercise of its inherent jurisdiction to control its own proceedings.

In Amos v. Chadwick, Robinson v. Chadwick, and Smith v. Chadwick (1877) 4 Ch.D. 869, three plaintiffs on behalf of themselves and seventy-five others who had filed separate suits against the same defendant brought a motion asking that the actions be consolidated or that one of the actions namely Robinson v. Chadwick be tried as a representative action and that the proceedings in the other actions be stayed. The motion was opposed by the defendant. Malins, V.C. in dealing with the matter said at page 872:

> "It is said that I have no power to do this because Order LI., rule 4 under which the motion is made, applies only to the former practice of the Common Law Courts, under which actions could only be consolidated on the application of the Defendants, this rule does not expressly apply to this case, but I think the Court has still a general discretion over the conduct of proceedings, and will find some means of exercising it. No harm can be done by staying the next step in the other actions; and if I have no power to make this order, I think I ought to have it. But I think I have sufficient power, arising out of the general control which this Court exercises over proceedings commenced here.
>
> I see very plainly that to force on the continuance of the seventy-eight actions would be most oppressive and inexpedient, and I will exercise the general control which I have over all the proceedings in this branch of the Court, by extending the time for taking the next step in all other actions till the actions of Smith v. Chadwick and Robinson v. Chadwick have been tried.
>
> If there is any doubt as to what is the proper form of order, I think it is at least perfectly clear that when these summonses were taken out there was a discretion in the Court to extend the time for taking the next step. If the applications had been made in Court, I should have been able to exercise a discretion as to what time should be allowed. And it can make no difference as to this power that the applications were made in Chambers."

Mr. Muirhead would distinguish this case on the basis that what was ordered was an enlargement of time. The significance of this case however does not lie in the form of the order made but in the nature of the application, which was firstly for consolidation (which under the rules was not possible) and secondly for a stay under the discretionary powers of the Court in exercising control over its own proceedings.

The applicants were not shut out as having no locus standi, rather they were heard on the merit and the next step in their own proceedings was stayed through the device of an enlargement of time. The effect of the order was that further proceedings in seventy-six actions brought by the plaintiffs were on their own application stayed until after two of the actions had been tried. There is here more than a passing similarity with the fact situation before Parnell, J., as also in the nature of the order made by him.

The learned authors of Daniell's Chancery Practice (7th Edition) Vol. 2: appear also to be of the view that what was effected in the case was a stay achieved through an enlargement of time. Thus they stated at page 1612:

> "Where numerous actions have been brought by different plaintiffs against the same defendants, the Court although it cannot on the application of the plaintiffs, consolidate the actions, will if the justice of the case requires it, make on their application an order selecting one of the actions to be tried as a test action and staying in the meantime the proceedings in the other actions, or enlarging the time for taking the next step in the other actions until after the trial of the test action."

Amcs v. Chadwick (supra) was cited as authority for this proposition.

A sequel to the above cases was Robinson v. Chadwick (1878) 7 Ch.D. 878. The statement of facts in the case showed that after this action had been set down for trial before Fry, J. on 15th March, 1878, the plaintiff on 8th March, 1878 took out a summons in the Chambers of Vice-Chancellor Malins to stay all further proceedings in the action on payment of costs but the Vice-Chancellor refused the application on the ground that having regard to the order made by him on 23rd. February, 1877, constituting this action as a test action, the plaintiff was not "dominus litis" but was in the position of a trustee for the plaintiffs in the other actions. Here it is to be noted that the plaintiff was not precluded from a hearing on the ground that as a plaintiff seeking a stay of his own proceedings he had no locus standi. Rather his application was refused on the ground that he was not dominus litis. It may be inferred that had he been dominus litis and the justice

of his case so required, an order for a stay as appropriate would have been made.

In Brooksbank v. Higginbottom (1862) Vol. 54 E.R. page 1050, a plaintiff applied for and obtained a stay of his own proceedings. The circumstances were as follows: In 1860 Brooksbank who was a mortgagee of a testator filed his bill of foreclosure. There was then pending an administration suit namely, Bent v. Buckley in respect of the testator's estate. In 1861 an order was made in this suit by which the amount of Brooksbank's mortgage debt was ascertained and its payment provided for, and under a further order in Bent v. Buckley a sum of £200 was reserved for costs of Brooksbank in his action against Higginbottom. The plaintiff Brooksbank moved that all further proceedings in his action be stayed, that his costs be paid out of the £200 and the deficiency in costs if any be paid by the defendant in his action.

The Master of the Rolls /Sir John Romilly/ in holding that the plaintiff was entitled to stay the proceedings and to have the costs of it said:

> "Upon reconsidering this matter fully, I am of the opinion that the Plaintiff was entitled to file his bill, and that he was right in the course he took. He must therefore have the costs of this suit out of the £200 which has been set apart in Bent v. Buckley to answer any order which might be made in that suit.
>
> It is true that when the second suit was institutued, there existed a decree in Bent v. Buckley, under which it was proved, by subsequent events, that the Plaintiff might have gone in and proved, and have obtained payment of all that he was entitled to; but I think that this did not disentitle the Plaintiff to take proceedings to realise his security in the second suit. He could not foretell what might be the result of the suit in Bent v. Buckley, it was impossible to anticipate whether the estate would be sufficient to pay him or not, and he was not bound to wait until that had been ascertained before filing his bill; but for the result of the decree in Bent v. Buckley this second bill would be right. I think the Plaintiff was right in suspending the proceedings and I shall make the order asked for by the notice of motion."

In re Pitchford (1924) 2 Ch.D. 260, a stay of proceedings was obtained by a plaintiff in the following circumstances. On October 25, 1920 a mortgage broker issued a writ against a debtor in the King's Bench Division to recover the sum of £650 for commission earned. On June 20, 1921 the action was set down for trial. On July 19, 1921 a receiving order under the Bankruptcy Act 1914 was made against the debtor. On February 2, 1922 on the application of the plaintiff made in his action, the action was stayed with liberty to the plaintiff to restore.

The significance of this case lies in the fact that Section 9 of the Bankruptcy Act, 1914, (U.K.) which confers statutory power on the Court to stay proceedings, does not expressly confer on a plaintiff the right or entitlement to make application for a stay. In fact its provisions would contemplate that the defendant or his trustee would ordinarily make the application. Yet the Court in exercising control over its proceedings, entertained the application of the plaintiff and made the order for stay which he sought.

The Bankruptcy Act, 1914, Section 9 provides as follows:

> "9(1): The court may at any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the debtor and any court in which proceedings are pending against a debtor may on proof that a bankruptcy petition has been presented by or against a debtor, either stay the proceedings or allow them to continue on such terms as it may think just.
>
> (2) Where the court makes an order staying any action or proceeding or staying proceedings generally, the order may be served by sending a copy thereof under the seal of the court, by post to the address for service of the plaintiff or other person prosecuting such proceeding."
>
> (Underlining mine).

In my view, unless the statute conferring statutory power to stay proceedings prescribes the procedure to be followed by the Court, there is no distinction between the exercise by the Court of such statutory powers of staying proceedings, and the exercise by it of its inherent jurisdiction to stay proceedings. If a plaintiff is

accorded locus standi in the former case there is no good reason for denying him locus standi in the latter case. The statute being silent as to who may apply, it is reasonable to infer that the status accorded the plaintiff to apply for the stay of proceedings must have derived from the undoubted right of the Court to hear any person, not in contempt of it, as an integral and indivisible part of its power to control its own proceedings and dispense justice.

In all these cases the plaintiffs were not only accorded locus standi but no doubt was expressed on the propriety of their application nor was it said that the application was misconceived and that they could affect their own proceedings only by the route of discontinuance.

Mr. Muirhead in submitting that a plaintiff had no locus standi to apply for a stay of his own proceedings sought to buttress his submissions by directing our attention to Section 240 of the Judicature (Civil Procedure Code) Law which provides for discontinuance of actions by a plaintiff. He submitted that not only is discontinuance a procedure peculiar and exclusive to the plaintiff in dealing with his action but it is the only procedure which is available to him. Section 240 reads thus:

> Section 240:
>
> "The plaintiff may, at any time before receipt of the copy of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application) by notice in writing wholly discontinue his action against all or any of the defendants .... and thereupon he shall pay such defendant's costs of the action.
>
> Such costs shall be taxed, and such discontinuance ... shall not be a defence to any subsequent action. Save as in this action otherwise provided, it shall not be competent for the plaintiff .... to discontinue the action without leave of the court or a judge but the judge may before, or at, or after the hearing or trial, upon such terms as to costs and as to any other action, and otherwise, as may be just, order the action to be discontinued."

It is clear that Section 240 primarily envisages cases where a plaintiff does not wish to pursue further a claim brought by him either because on more mature reflection he considers that the claim

is legally untenable, or is barred by the Limitation Act or is not properly constituted, or because the claim in its present form is defective and cannot be made good by amendment. What the section provides for is that within a certain time frame the plaintiff may discontinue, with absolute freedom to commence another action provided he pays to the defendant such costs as the latter may have incurred. After the expiration of that time if he wishes to discontinue he has to seek the leave of the Court and may be put on terms as to costs and the bringing of a further action.

The section on a proper construction does not lead to any inescapable inference or conclusion that a plaintiff can affect the course of his proceedings only by resorting to discontinuance, nor does the said section in any way circumscribe the jurisdiction, statutory, and inherent, of a Court to regulate and control its own proceedings. Any such view that a plaintiff can have resort only to Section 240 would, for example be ignoring another section under which a plaintiff may albeit not exclusive to himself affect proceedings commenced by him. This is Section 355 of the Judicature (Civil Procedure Code) Law which reads:

> "355 - The Judge may, if he thinks it expedient for the interests of justice, postpone or adjourn a trial for such time and to such place, and upon such terms, if any, as he shall think fit."

Section 355 is usually invoked by plaintiff and defendant alike at the trial of the action but as was said in Amos v. Chadwick (supra) once the power is given to postpone proceedings it can make no difference that the application is made in Chambers and before trial.

I must now consider the submission of Mr. Muirhead that a plaintiff can derive no comfort from Section 48(e) of the Judicature (Supreme Court) Act because it neither confers on him locus standi nor confers power on the Court to grant to him a stay of proceedings even if he surmounts the locus standi hurdle. The section reads thus:

> "48(e) - No proceeding at any time when pending in the Supreme Court shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of such proceeding might have been obtained if this Act had not passed, either unconditionally or on any terms or conditions,

> may be relied on by way of defence thereto; but nothing in this Act contained shall disable the court from directing a stay of proceedings in any cause or matter pending before it if it thinks fit, and any person, whether a party or not to any such cause or matter, who would have been entitled if this Act had not been passed to apply to any court to restrain the prosecution thereof, or who may be entitled to enforce by attachment or otherwise any judgment, decree, rule or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shallbe at liberty to apply to the said court by motion in a summary way for a stay of proceedings, either generally or so far as may be necessary for the purposes of justice and the court shall thereupon make such order as is just."

The first duty is to construe what the section says. In my view on a proper construction it contains three provisions namely:

1. That no proceeding pending in the Supreme Court shall be restrained by prohibition or injunction as a means of protecting equitable claims but that instead, all such matters of equity may be pleaded in the proceeding.

2. That the jurisdiction of the Court to grant a stay of any proceedings in any cause or matter pending before it, if it thinks fit, is preserved and expressly recognised and that the Court shall not be disabled from exercising its jurisdiction by anything contained in the Act.

3. That persons who before the Act were entitled to seek the aid of the Court of Chancery to restrain the prosecution of an action against them on grounds considered sufficient by the Court of Chancery may now apply in the action for a stay thereof.

The first and third provisions are inter-related. The abrogation of the right of one Court to prohibit or restrain proceedings in another Court is explicable only by reference to history. Prior to the Supreme Court of Judicature Act, 1873 (U.K.) the Court of Chancery in England exercised indirect control over proceedings in the Common Law Courts by making orders of prohibition and injunction against plaintiffs in Common Law Courts prohibiting or restraining them from pursuing their strict legal rights at law where to do so would, in the view of the Court of Chancery be to disregard some equitable right of a defendant cognisable only in the Court of Chancery.

With the fusion of the administration of justice into one High Court of Justice albeit operating in distinct divisions prohibitions and injunctions hitherto granted by the Court of Chancery against plaintiffs in the Common Law Courts became unnecessary and irrelevant because it was provided that each division should administer both law and equity where necessary in any cause or matter pending in that division. Thus Section 24(5) of the Supreme Court of Judicature Act, 1873 (in pari materia with Section 48(e) of our Act) provides that the practice of indirectly restraining actions at law by the Court of Chancery should cease. Looking back in history there was at one time in Jamaica a High Court of Chancery in addition to inter alia a Supreme Court of Judicature. To the extent that this High Court of Chancery may have been exercising in relation to the Supreme Court of Judicature an indirect control analogous to that exercised by the Court of Chancery in England, Section 48(e) took away in like manner as in England the said indirect control.

This first provision in Section 48(e) has a direct bearing on the third of the provisions which I will deal with here. In regard to the third provision, it was no doubt realised that an application by a person to the Court of Chancery to restrain the prosecution of a claim commenced against him in the Common Law Court may have been made not in defence of or in protection of some equitable right, but because it would for any number of other reasons be unjust. This latter provision of Section 48(e) expressly states that in lieu of the applicant's right to obtain a restraining order in the Court of Chancery he is now entitled to apply for a stay of the proceedings the prosecution of which against him, he asserts, would be against equity, and good conscience. Undoubtedly the persons contemplated in these two provisions are defendants and defendants only.

Mr. Mahfood's brave effort to show by reference to decided cases that these provisions contemplated plaintiffs was futile and lacked persuasion because in relation thereto it is difficult to envisage a plaintiff in a common law action going to the Court of Chancery to

obtain an order to restrain his own common law action on the ground that his own action is inequitable and unconscionable with regard to the defendant. To the extent that what these provisions contemplate is hostile action directed against an adversary's suit it can only be a defendant who may apply for a stay.

However the second provision of Section 48(e) recognises the inherent jurisdiction of the Court to grant a stay of proceedings in any cause or matter pending before it if it thinks fit. This inherent jurisdiction was exercisable by Common Law Courts as well as the Court of Chancery.

By the plain terms of this provision the Court is not circumscribed either as to the instances in which it will grant a stay or as to the person in favour of whom it will grant a stay.

Mr. Muirhead in support of his contention that a plaintiff has no locus standi under Section 48(e) submits in effect that notwithstanding the apparent illimitable scope of the inherent jurisdiction expressly preserved by the section, it is limited by the third provision in that section, that is to say, it can be invoked only by the category of persons who could have applied to the Court of Chancery to restrain Common Law actions. In this Mr. Muirhead is clearly wrong because the provision in Section 48(e) recognising the inherent power of the Court to grant a stay of proceedings has by the actual words used put beyond doubt and uncertainty any suggestion that the jurisdiction is limited in its scope. The section explicitly states that nothing in the Act contained shall disable the Court from directing a stay of proceedings if it thinks fit. The third provision in Section 48(e) which specifies a category of persons who may apply for a stay, being itself a part of the Act, is caught by the express declaration that it, like other parts of the Act, shall not disable the Court from entertaining other applicants in any circumstance that it thinks fit. Thus a plaintiff is not precluded on a proper construction of the section from applying qua plaintiff for a stay of his own proceedings.

In this context the proposition of Dr. Barnett at the hearing of the summons which was accepted by the learned trial judge and which is maintained before this Court is in my view well founded as being within the scope and intendment of Section 48(e). Inasmuch as that section recognises therein the unfettered inherent jurisdiction of the Court an order made in exercise of the inherent jurisdiction is still an order made under Section 48(e). The proposition of Dr. Barnett which I regard as valid is that all persons have locus standi who can establish a sufficient interest in the subject matter of a proceeding even though they do not come within the category of persons who could previously have secured an order in the Court of Chancery restraining an action at law. Any such person has locus standi and may be granted a stay if he can show that he would suffer a real disadvantage by the continuation of the proceeding for the time being, and if being a plaintiff, he would equally suffer a real disadvantage if he was compelled to discontinue the proceedings. He is entitled to apply to the Court under its inherent jurisdiction expressly preserved by Section 48(e) to grant him a stay of the proceedings for such time as in all the circumstances appear reasonable whether by postponement of the proceedings or by some other appropriate means.

The next submission of Mr. Muirhead with regard to the inherent jurisdiction recognised by Section 48(e) is that a plaintiff in any case could not get relief thereunder because the jurisdiction is exercisable only in cases where the proceeding is vexatious and oppressive, and a plaintiff could never contend that his own proceeding was vexatious or oppressive to himself nor could he say that his proceeding amounted to an abuse of the process of the Court. Mr. Muirhead cited The Atlantic Star (1973) (H.L. (E.)) 2 All E.R. 175 and MacShannon v. Rockware Glass Ltd. (1978) (H.L. (E.)) 2 W.L.R. 362 as among the most recent authorities wherein the principles applicable to a stay of proceedings in exercise of the inherent jurisdiction of the Court were laid down. These cases dealt with situations which

were not characterised as properly lis alibi pendens situations. They therefore established general principles. They do not however support Mr. Muirhead's submission as showing any limit to the scope of the exercise by the Court of its inherent jurisdiction either in relation to applicants or to circumstances.

The principles governing a stay of proceedings when sought by a defendant in a non lis alibi pendens situation had previously in the earlier case of St. Pierre v. South American Stores (Gath and Chaves) Ltd. (1936) 1 K.B. 382, been stated thus by Scott, L.J. at page 398:

> "The true rule about a stay under section 41 (analogous to our section 48(e)) so far as relevant to this case (underlining mine) may be stated thus:
>
> (a) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought... (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way: and (b) the stay must not cause an injustice to the plaintiff."

I have underlined these words 'so far as relevant to this case' to highlight the fact that the principle was stated against the background of a defendant who was applying in a situation which was not a lis alibi pendens situation, to deprive a plaintiff of a right which the latter had of proceeding with his action in England. Though the principle recites as one of the conditions to be satisfied that the defendant must show that the continuance of the action would be oppressive or vexatious, it does not irresistibly lead to the inference that only a defendant is contemplated as an applicant for a stay because as was found by Mallins V.C. in Amos v. Chadwick (supra) the bringing of many actions by different plaintiffs against a single defendant may albeit originally foolhardy on the plaintiffs' part, nevertheless subsequently prove to be oppressive to them and inexpedient for all the actions to continue simultaneously. The

principle as stated by Scott, L.J. would equally be applicable if a plaintiff was the applicant by the more substitution of plaintiff for defendant in 2(a) and defendant for plaintiff in 2(b).

The principles applicable to a stay in exercise by the Court of its inherent jurisdiction have since been modified and expressed in more felicitious language shorn of the words "oppressive and vexatious." Thus shorn of the words "oppressive and vexatious" the principles have been rendered more flexible to accommodate the exercise by the Court of its inherent jurisdiction to grant a stay in the varying circumstances that may arise. The modified statement of principles are reflected in the opinions expressed in the House of Lords in The Atlantic Star and in MacShannon v. Rockware Ltd. (supra)

In The Atlantic Star (supra), Lord Wilberforce said:

> "Page 189 - The case for staying this English action and remitting the respondent to his remedy in Antwerp is therefore a strong one. If the question whether it should be stayed is a matter of judicial discretion, there seems to be very good reasons for doing so. So the first question must be whether the discretion exists, and if so whether it is a free discretion or one limited in any way by any rule of law."
>
> (Underlining mine).

Dealing with Section 24(5) of the Supreme Court of Judicature Act 1873 (in pari materia with our Section 48(e)) he said:

> "Page 191 - The form of Section 24(5) was evidently such as to secure that whatever special powers might be defined by rules of court, the inherent and general power of the High Court to stay proceedings should remain. This has been generally accepted since 1873. Section 24(5) has itself been replaced by Section 41 of the Supreme Court of Judicature (Consolidation) Act 1925 which is in similar form: and though there is now in the rules a provision relating to cases of vexation or oppression it has never been contended that the powers of the court to stay is limited to such cases."

Commenting on the principle stated by Scott, L.J. in the St. Pierre case (supra) he said:

> "Page 193 - This clear and emphatic statement has proved its usefulness over the years. It has been applied by judges, without difficulty to a large variety of cases. But too close and rigid an application of it may defeat the spirit which lies behind it and this is particularly true of the words "oppressive and vexatious."

> These words are not statutory words ..... they are descriptive words which illustrate but do not confine the courts general jurisdiction. They are pointers rather than boundary marks."

He formulated the principle applicable to a stay thus:

> "Page 194 - In considering whether a stay should be granted the court must take into account (i) any advantage to the plaintiff (ii) any disadvantage to the defendant, this is the critical equation."

This simple and more succinct statement of the principle is in my view equally applicable to a plaintiff/applicant as to a defendant/applicant.

In MacShannon v. Rockware Glass Ltd. (supra) Lord Diplock commenting on Lord Wilberforce's view that the words "oppressive" and "vexatious" ought to be given a more liberal meaning was of the view that they should be omitted from the formulation of the principle governing stay.

On the approach to be adopted in an application for a stay of proceedings Lord Diplock said:

> "Page 368 - My Lords, the decision whether or not to grant a stay involves the application of a judicial discretion to the facts of the particular case. In each of the actions the plaintiff and the defendant are the parties between whom justice is to be done."

Earlier on he had pondered the matter of modification of common law principles to meet new situations which modifications had been found essential to the growth of the Common Law and to its flexibility. He said:

> "Page 366 - The progress of the common law is gradual. It is undertaken step by step as what has been stated in a previous precedent to be the law is re-examined and modified so as to bring it into closer accord with the changed conditions in which it falls to be applied today."

Lord Salmon in the MacShannon case (supra) in expressing his opinion on the principle which should apply to a stay of proceedings based his opinion on an unrestricted inherent jurisdiction residing in the Court to grant a stay in the different circumstances that may arise. He said:

> "Page 372 - The common law of England almost invariably marches in step with common sense ..... Section 24(5) of the Supreme Court of Judicature Act 1873 removed the power to restrain by injunction any proceedings before the High Court, but stated expressly that nothing in the Act shall disable the court from staying any proceedings before it "if it shall think fit." This subsection also expressly provides that any person who but for the Act would have been entitled to apply for an injunction to restrain the prosecution of proceedings before the court, should be at liberty to apply for a stay of such proceedings either generally, or so far as may be necessary for the purpose of justice." There is nothing in the Act of 1873 or in any of the rules made under it, to limit the powers of the court to stay proceedings in cases in which such proceedings were oppressive or vexatious. Indeed the rules made no reference to vexation or oppression. It was not until the Judicature Rules of 1883 were enacted that the word "vexatious" or cases of vexation were referred to; and not until after the Supreme Court of Judicature (Consolidation) Act 1925 that the rules referred to "case of vexation or oppression" but they did not in my view, curtail the court's inherent jurisdiction to stay by confining it to such cases. The courts would never stay an action lightly but only if convinced that justice required that it should be stayed. Justice would no doubt so require if but, in my view, not only if the action would properly be described as "vexatious or oppressive."

The excerpts from the above two recent cases construing Section 41 of the Supreme Court of Judicature (Consolidation) Act 1925 (U.K.) which as I have earlier said is in pari materia with our Section 48(e) in my view effectively destroys the submission of Mr. Muirhead that Section 48(e) is to be interpreted restrictively as confined to cases of "vexation or oppression" or to cases amounting to an abuse of the process of the Court. The opinions expressed on Section 41 of the U.K. Act demonstrate that like our Section 48(e) it encompasses as wide a range of circumstances in which it can be invoked as one ends of justice demands.

By reminding us that the common law invariably marches with common sense and that the secret of its growth lies in its flexibility for adaptation to changing circumstances without violating its core principle of justice, one can more easily perceive and appreciate Parnell, J.'s commendable effort to do justice in the situation which presented itself before him which was essentially "res integra."

No case could be found where a plaintiff having sued a defendant in one jurisdiction, had subsequently for good and sufficient reasons sued another defendant in another jurisdiction because he honestly and genuinely believes that the latter defendant can be made answerable for the wrongdoing of the former. If such a plaintiff discontinues the first action, he renders himself not only liable for the cost of discontinuance but in addition runs the risk of being effectively disabled from suing again in the event that the second suit should establish that the defendant is not liable for the wrongdoing of the other defendant. The first defendant if he is a foreigner could after such discontinuance lawfully remove his assets from Jamaica and thereafter leave no trace of his whereabouts. If that defendant is a company it could be liquidated leaving thereafter no one capable of being sued. Again even if the first defendant could thereafter be traced and sued he may be enabled by the intervening discontinuance to meet the claim of the plaintiff by a defence of Limitation.

There is in my view no principle of law which necessarily and inevitably requires a plaintiff to proceed at double expense with two actions simultaneously against two distinct defendants under sanction that if he fails to do so, he must either discontinue the first action or have it dismissed for want of prosecution. Equally in my view there is no rule of law which requires a plaintiff necessarily and compulsorily to discontinue his action where there is no advantage to him in doing so and he does not wish to discontinue but merely desires to have the action postponed or suspended for good and sufficient reason. The principle applicable in cases where a postponement is sought by the plaintiff due to his illness is not different from the principle applicable where a postponement is sought because the plaintiff will be engaged in other judicial proceedings either locally or in a foreign forum. If a postponement or stay would be granted in the former situation there is no reason why it should not be granted in the latter situation. The core principle in all cases is the doing of justice between plaintiff and defendant.

The complex issues of law raised in the case before Parnell, J. which were equally raised before us stemmed from Mr. Muirhead's insistence as the premise of his submissions that a stay meant exclusively a hostile action designed to put an end to an adversary's action. Such undoubtedly has been the meaning only in the lis alibi pendens situation.

However the word "stay" has not been statutorily defined and in the context in which it was used in the summons before Parnell, J. it was obvious that it was not being used in the sense of putting an end to an adversary's action as in the lis alibi pendens cases. The situation before Parnell, J. was fundamentally different from a lis alibi pendens situation. Chase Jamaica is not being sued in two jurisdictions that is to say here and in Delaware. Thus Chase Jamaica has not and could not argue that the suit brought against it in Jamaica has put it at a disadvantage as compared with Delaware where if the suit had been brought it would suffer less disadvantage. On the contrary the submission on behalf of Chase Jamaica is that the disadvantage to it lies in its being impleaded in Delaware. This submission is however wholly untenable and palpably inconsistent with the assertion of Chase on its behalf that the parties in the Jamaica action and in the Delaware action are different.

In my view Rose Hall Limited in seeking a stay of proceedings before Parnell, J. was asking in simple language for an order enabling it to suspend the prosecution of its claim against a defendant in Jamaica pending the hearing and determination of a wider suit involving the Jamaican claim against a different defendant from whom it hoped to recover in respect of its claim against the defendant in Jamaica.

I have already adverted to circumstances which could induce a plaintiff in such a situation to ask for an order of the Court to enable it to stay or suspend for a time its proceedings. Perhaps but for a mistaken view that an adjournment or postponement under Section 355 of the Judicature (Civil Procedure Code) Law, could only

be applied for at the trial, Rose Hall Limited most likely would have invoked this Section in addition to the other sections of the above law which it invoked to show that it was asking for a stay having effect as a postponement.

The cases earlier mentioned show clearly that plaintiffs have been accorded locus standi in applications for stay of proceedings where what they are really asking for is a postponement or suspension of the actions commenced by them. Section 48(e) also on a proper construction is neither restrictive of the persons who may apply nor of the instances in which a stay of proceedings may be granted having regard to the inherent jurisdiction of the Court which is statutorily recognised therein. The exercise of the jurisdiction is as wide as the demands of justice require. This in essence summarises the opinions expressed in the House of Lords in the Atlantic and in MacShannon v. Rockware Glass Ltd. (supra).

Accordingly Ground 1(a) and (c) of the grounds of appeal also fails.

The second ground of appeal is formulated in the alternative that is to say on the basis that if the learned judge was correct in according locus standi to Rose Hall Limited, he nevertheless wrongly exercised his discretion in making the order in that he failed to give any or any sufficient regard to relevant factors. Most of these factors however are based on the assumption that Rose Hall Limited's application has been made in a lis alibi pendens situation. Ground 2 (a), (b), (c), (d), (f), and (h) complains that the learned trial judge failed to give sufficient consideration to the under-mentioned matters namely:

(a) That the subject matter of the action is wholly situated in Jamaica.

(b) That the defendant is a Jamaican Company.

(c) That the plaintiff is a Caymanian Company whose principal asset was then located in Jamaica.

(d) That the Jamaican Law is the applicable law.

(f) That Jamaica is the natural forum.

(h) That the trial in Delaware would not determine all the issues raised in the instant case.

Some of the above factors would certainly be relevant in a case in which Chase Jamaica was being forced into litigation in Delaware but they are in the present situation irrelevant because Chase Jamaica not being a defendant in the Delaware action is not being forced into any litigation there. What had to be established by Chase Jamaica was that not merely would it be convenient that its case be tried in Jamaica which was never disputed, but that there was a disadvantage to it far outweighing the advantage to Rose Hall Limited in the trial being postponed or suspended which was all that the stay in the circumstance implied.

The learned trial judge found that there were distinct advantages to Rose Hall Limited in pursuing the Delaware action while adopting a wait and see strategy with respect to the Jamaican action. Rose Hall Limited asserted that it would be just for it to do so and that it would result in no injustice to Chase Jamaica. Chase Jamaica has not been able to show any hardship or disadvantage other than that which follows from any postponement or suspension of proceedings. The suspension of proceedings in this case is not that inordinately long nor indefinite as to amount to an injustice. It cannot be said that the considerations which were relevant namely advantages to Rose Hall Limited and disadvantages to Chase Jamaica had not been properly highlighted, weighed and balanced.

The learned trial judge having summarised Mr. Mahfood's submissions on the advantages to Rose Hall Limited in pursuing the Delaware action and Mr. Muirhead's submissions on the asserted disadvantages to Chase Jamaica in having the prosecution of the Jamaican action suspended, found that the advantages to Rose Hall Limited of a stay or suspension of the Jamaican action outweighed any disadvantage to Chase Jamaica. In this he was clearly right

and there is no error in the manner of, or on the basis on which he exercised his discretion. Equally the manner in which the discretion was exercised created no inconsistency with any extant decision relating to stay of proceedings. As I have said before the situation was "res integra" and the guiding principle of justice was applied. This ground of appeal also fails.

There was a third ground of appeal based on the question of cost. Mr. Mahfood in answer to the submissions of the appellants on this ground maintained that the order for costs of the trial judge was reasonable and ought not to be interfered with. On a more fundamental ground he further submitted that in any case there is no valid appeal before the Court on the question of cost because the purported appeal against cost was made before any order for cost was made. Further no leave to appeal was sought nor was any appeal filed in respect of costs after the order for costs had been made. He cited Patrick v. Walker 9 J.L.R. 510 as authority for the proposition that where leave to appeal is required and had not been given at the time the appeal was filed the irregularity cannot be cured. Mr. Muirhead conceded that no leave had been granted also that no appeal against cost had been filed subsequent to the making of the order for cost. He accordingly did not press further this ground of appeal. Having regard to Patrick v. Walker (supra) I must hold that the appeal as to cost is not properly before us. That ground is accordingly struck out and dismissed.

For the reasons given in this judgment the appeal ought to be dismissed and the order of the trial judge confirmed.

ZACCA, P.

By a majority the appeal is dismissed with costs to the respondents to be agreed or taxed.